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No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WALTER ZANT,
Warden, Georgia Diagnostic and Classification Center,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATES OF ALABAMA, CALIFORNIA, FLORIDA, MISSOURI NORTH CAROLINA, SOUTH CAROLINA, UTAH IN SUPPORT OF PETITIONER, AMICI CURIAE

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QUESTION PRESENTED

When a sentence of death is imposed, and when more than one aggravating circumstance is found to warrant the imposition of the death penalty, is the sentence to be vacated because one of the aggravating circumstances is set aside?

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Georgia, denying the respondent's petition for a writ of habeas corpus, is unreported and appeared in the Appendix of petitioner's petition for a writ of certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the decision of the District Court insofar as it left standing the sentence of death and remanding the cause for further proceedings, is reported as

Stephens v. *Zant*, 631 F.2d 397 (5th Cir. 1980). The Fifth Circuit's modification of its opinion and denial of the petitioner's motion for rehearing is reported at 648 F.2d 446 (5th Cir. 1981).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 26, 1980, and the petitioner's motion for rehearing was denied on June 18, 1981. The petitioner's petition for a writ of certiorari was filed in this court on July 10, 1981, and certiorari was granted on October 5, 1981. The jurisdiction of this Court was invoked by petitioner under 28 U.S.C. § 1254(1).

INTEREST OF THE AMICI CURIAE

The above-listed states, by and through their respective Attorneys General (see Appendix), respectfully offer the present brief as *amici curiae*, in support of the position of the petitioner in this cause. All of the states joining in this brief have laws providing for the imposition of the death penalty, which laws require the sentencing authority to specifically find at least one statutory aggravating circumstance before a sentence of death may be imposed. The precise issue raised in the present cause has either arisen or may arise in all of these states. For this reason, the *amici* have a substantial and continuing interest in cases such as that at bar which address the present issue.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Eighth Amendment to the United States Constitution reads as follows:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

2. The Fourteenth Amendment to the United States Constitution reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 28 U.S.C. § 2254(a) reads as follows:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws and treaties of the United States."

STATEMENT OF THE CASE

The respondent, Alpha Otis O'Daniel Stephens, was convicted of murder on January 21, 1975, following a trial by jury in the Superior Court of Bleckley County of the State of Georgia (Petitioner's Exhibit 1—hereinafter Ex. 1[1]—at pp. 11-12). After a separate hearing on the issue of punishment, the jury imposed a sentence of death (Ex. 1 at 12-13).

The facts relevant to this conviction and sentence are as follows: in 1973, a year before the murder presently at issue, the respondent committed a murder, an armed robbery and four burglaries in Twiggs County, Georgia (Ex. 4 at

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[1]Petitioner's Exhibits 2 and 3, the trial transcript, will hereinafter be identified as "T.Tr.".

12-15). He was apprehended and pleaded guilty to the four burglaries on November 16, 1973, for which he received four concurrent terms of three years imprisonment (Ex. 4 at 13-15). While in custody pursuant to these convictions, respondent escaped from confinement, was recaptured and was returned to a county jail to await trial on the escape charge (Ex. 1 at 25; T.Tr. 117, 194). On August 19, 1974, respondent escaped from the county jail (Ex. 1 at 25; T.Tr. 117-118, 194-195, 214, 316). After escaping, respondent stole a car and drove to Macon, Georgia, where he stole another vehicle, drove to a nearby county and committed a burglary (T.Tr. 116-119, 194-196, 214, 346); thereafter, he stole a third car and committed an armed robbery and several burglaries (T.Tr. 119, 196-197, 215, 347; Ex. 4 at 10). Respondent then went to Atlanta, where he pawned a stolen pistol, returned to Macon, and on August 21, 1974, he went to the home of Charles Asbell in Twiggs County (T.Tr. 61, 69-70, 119, 122, 198-199, 216-217, 347-348).

Respondent broke into Charles Asbell's home (Asbell was absent) and took a number of weapons, including a .357 Magnum pistol, which he proceeded to load (T.Tr. 62-63, 65-66, 120, 199). After respondent loaded the booty into his stolen car and as he was attempting to start the vehicle, Roy Asbell (who was Charles Asbell's father and who lived nearby) drove up (T.Tr. 64, 120, 199, 217, 348). When this occurred (and, according to respondent, after Mr. Asbell had made a racial slur), respondent ran to Asbell's car, pulled him from the vehicle and struck him in the face several times (T.Tr. 120, 199, 217, 348); respondent is 6'2" in height, and Asbell was 5'6" and crippled as a result of a tractor accident which broke his pelvis in five places (T.Tr. 56-57, 334). When Asbell offered respondent money to spare his life, respondent took the money and then kicked and pistol-whipped Asbell, inflicting a broken jaw and several skull fractures (T.Tr. 46, 49, 120-121, 200, 217). Respondent

then drove Asbell several miles to a pasture, where he took Asbell out of the car (T.Tr. 120, 201). Asbell, who walked with a severe limp, hobbled to an abandoned barn in an attempt to escape; respondent followed Asbell to the barn, where he placed the .357 Magnum pistol to Asbell's ear and fired two high-velocity bullets through his brain, blowing off the top of Asbell's head (T.Tr. 45-46, 122, 201-202, 218, 349).

Respondent was apprehended in Savannah, Georgia, the next day (T.Tr. 90-92, 123, 155, 204, 218, 349). After giving police a false name and several false stories, he confessed to the murder of Roy Asbell (T.Tr. 107-109, 113-116, 122, 127, 180-184, 186-190, 192-193, 201, 205, 212, 224, 336). Roy Asbell's car was found outside a Savannah hotel where respondent had stayed and the .357 Magnum pistol found in respondent's possession was positively identified as that taken from the home of Charles Asbell (T.Tr. 62-63, 91-92, 109, 124, 126-127, 185-186, 205-206, 208-211, 216, 261, 265). Respondent's fingerprints were found in the stolen car abandoned at Charles Asbell's residence (T.Tr. 61, 84-85). Following his apprehension and before his present trial, respondent entered pleas of guilty to his 1973 murder and armed robbery as well as to kidnapping, two counts of armed robbery, two counts of burglary and theft committed after his escape (Ex. 4 at 8-12). Among the sentences imposed for these crimes were five terms of life imprisonment (Ex. 4 at 10-12).

After respondent's conviction for the murder of Roy Asbell, the trial jury was instructed as to four possible aggravating circumstances, any one of which would permit a sentence of death. See Ga.Code.Ann. § 27-2534.1(b). In its verdict imposing the death penalty, the jury specifically found the following aggravating circumstances:

1. That respondent committed the murder after escap-

ing from a place of lawful confinement, Ga.Code.Ann. § 27-2534.1(b)(9);

2. That respondent had a prior record of conviction for a capital felony, Ga.Code.Ann. § 27-2534.1(b)(1); and

3. That respondent had "a substantial history of serious assaultive criminal convictions," Ga.Code.Ann. § 27.2534.1(b)(1) (Ex. 1 at 12-13).

A year after respondent's conviction, the Supreme Court of Georgia held that the third of the above-quoted aggravating circumstances was unconstitutional because it was impermissibly vague. *Arnold* v. *State*, 236 Ga. 534, 224 S.E.2d 386, 391-392 (1976).

On respondent's direct appeal from his conviction and sentence, he asserted among other things that his sentence of death should be vacated because the third aggravating circumstance listed above had been held invalid. In affirming respondent's conviction, the Supreme Court of Georgia noted that "the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired." *Stephens* v. *State*, 237 Ga. 259, 227 S.E.2d 261, 263 (1976), *cert. denied* 429 U.S. 986 (1977). Pursuant to its duty under Ga.CodeAnn. § 27-2537, the Georgia Supreme Court independently reviewed the evidence in this case and found the death sentence to be properly imposed. *Stephens* v. *State, supra*, 227 S.E.2d at 263-264. Following the affirmance of his conviction, respondent filed a state habeas corpus petition, which petition was denied and the denial affirmed. *Stephens* v. *Hopper*, 241 Ga. 596, 247 S.E.2d 92 (1978), *cert. denied* 439 U.S. 991 (1978). Thereafter, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, and the petition was denied by the District Court. *Stephens* v. *Zant*, No. 79-30-MAC (M.D. Ga., May 11, 1979) (unreported).

The ruling of the District Court was reversed and remanded by the United States Court of Appeals for the Fifth Circuit. *Stephens* v. *Zant*, 631 F.2d 397 (5th Cir. 1980), *opinion modified* 648 F.2d 446 (5th Cir. 1981). The present writ of certiorari followed.

SUMMARY OF ARGUMENT

It is the position of the *amici curiae* that the finding of an invalid aggravating circumstance by the jury or trial judge in its verdict imposing a sentence of death does not warrant the setting aside of the death sentence so long as (1) the sentencing authority finds at least one other aggravating circumstance which remains valid; and (2) no evidence is introduced at the sentencing hearing which would have been inadmissible had the invalid aggravating circumstance not been submitted.

The function of aggravating circumstances (using that term to refer to the statutory language of the circumstance itself rather than to the evidence introduced to sustain it) is to limit and channel the discretion of the sentencing authority by limiting the imposition of death to certain classes of murders; if one statutorily-defined class is found to be present, it is irrelevant whether or not other classes are present or whether all classifications found are valid. Once this threshold is crossed (and assuming that at least one statutory aggravating circumstance is found), the sentencing authority's decision as to what sentence should be imposed rests upon the evidence, not upon the statutory language. In the case at bar, the presence or absence of the invalid aggravating circumstance had no effect upon what evidence was admissible at the sentencing phase; this is equally true under most of the current state death penalty statutes. That being the case, as has been held by the majority of state courts which have considered this question, no basis exists for the reversal of a death sentence based

upon the invalidation of one of several statutory aggravating circumstances.

The arguments by the Fifth Circuit on this issue do not support its conclusion. This is not an instance where a general verdict is rendered and such verdict might rest upon an unconstitutional ground—to the contrary, the jury in the present case specifically found three statutory aggravating circumstances and only one valid circumstance was necessary to permit the lawful imposition of the death sentence. Nor can it legitimately be asserted that the sentence should be vacated because it might have caused the jury to unduly "focus" on some evidence; not only is this theory totally unsupported and speculative but it was beyond the scope of federal habeas corpus for the Fifth Circuit to independently review the present death sentence and vacate it based upon its own theories of error and prejudice rather than upon any constitutional defect in the proceeding.

In the past ten years, the views of this Court with regard to what is required for the constitutional imposition of capital punishment have changed with alarming frequency. This constant state of flux has resulted in the continuous voiding and reenactment of state legislation and the release of a stream of convicted murderers from the sentence manifestly justified by their crimes. Moreover, the decisions of this court have encouraged the implicit view in the lower courts that death sentences should be set aside by reason of technical legal niceties which have no reasonable relation to the validity of the sentencing process, and have further promoted excessive and deliberately dilatory litigation on the part of defendants and in particular the national organizations which seek to obstruct the imposition of all death penalties. The present state of affairs, in which the carrying out of any death sentence is a practical impossibility, is a mockery of the criminal justice system and cries out for action by this Court.

ARGUMENT

The sole issue in this cause is whether a sentence of death is rendered constitutionally invalid by the invalidity of a statutory aggravating circumstance found by the sentencing authority (the jury or the trial judge), even though the sentencing authority also found other statutory aggravating circumstances which are proper and supported by the evidence. It is the position of the *amici curiae* that the finding of an invalid aggravating circumstance does not cause a death sentence to violate the constitution so long as (1) the sentencing authority finds at least one other aggravating circumstance which is constitutionally valid and supported by the evidence; and (2) no evidence is introduced at the sentencing hearing which would have been inadmissible absent the submission of the invalid aggravating circumstance.

I. The Capital Sentencing Process

The argument of the *amici curiae* rests upon the nature of the process by which death sentences are imposed and upon the meaning of the term "aggravating circumstance." Under the laws of all 35 states which currently have the death penalty,[2] a verdict of guilt as to a capital offense results in a separate hearing on this issue of punishment in which further evidence may be introduced by the parties.

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[2]Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. See Gillers, "Deciding Who Dies," 129 U.Pa.L.Rev. 1, 101-119 (1980); and footnote 3, *infra*. State statutes which have been declared unconstitutional by the highest state court or which are manifestly unconstitutional under this Court's past decisions are excluded from this list. See, e.g., *District Attorney* v. *Watson*, 411 N.E.2d 1274 (Mass. 1980).

With regard to what evidence may be introduced by the prosecution at this punishment-phase hearing, the laws of the vast majority of states provide that such evidence is not limited to that required to establish the aggravating circumstance or circumstances submitted in the case, but may also include (varying with the language of each statute) the nature and circumstances of the offense, the character and background of the defendant, the prior convictions of the defendant, and any other matters relevant to sentencing.[3] This provision is both reasonable and consistent with the decisions of this Court; as noted in *Gregg* v. *Georgia*, 428 U.S. 153 (1976),

> "We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities

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[3]Ala.Code. tit. 13A, § 5-45(c) (1981 Supp.); Cal. Penal Code § 190.3 (1978 Supp.); Del.Code, tit. 11, § 4209(c) (1979); Fla. Stat. Ann. § 921.141(1) (1979 Supp.); Ga.Code.Ann. § 27-2503(a) (1977); Idaho Code § 19-2515(e) (1977 Supp.); Ky.Rev.Stat. § 532.025.1(a) (1976 Supp.); La.Code.Crim.Pro.Ann., art. 905.2 (1976 Supp.); Md. Ann.Code. art. 27 § 413(c) (1979 Supp.); Miss.Code.Ann., § 99-19-101(1) (1977); Mo.Rev. Stat. § 565.006.2 (1978); Mont.Rev.Code.Ann. § 46-18-302 (1977 Supp.); Neb.Rev.State. § 29-2521 (1979 Supp); Nev.Rev.Stat. § 175.552 (1979); N.H.Rev.Stat., § 630.5(II) (1977 Supp.); N.M.Stat.Ann., § 21-20A-1(C) (1979 Supp.); N.C.Gen.Stat. § 15A-2000(a)(3) (1978); Ohio.Rev.Code.Ann., § 2929.03(D)(1) (effective 10-19-81); Or.Rev.Stat. § 163.116(1) (1979); 42 Pa.Cons.Stat. Ann., § 9711(a)(2) (1981 Supp.); S.C.Code § 16-3-20(B) (1978 Supp.), as construed by *State* v. *Shaw*, 273 S.C. 194, 255 S.E.2d 799, 805-806 (1979), *cert. denied* 444 U.S. 957 (1979); S.D. Codified Laws Ann., § 23A-27A-2 (1979), Tenn.Code.Ann., § 39-2404(c) (1981 Supp.); Tex.Code.Crim.Proc.Ann., Art. 37.071(a) (1981 Supp.); Utah.Code. Ann. § 76-3-207(1) (1978); Va.Code.Ann. § 19.2-264.4(B) (1980 Supp.); Wyo.Stat. § 6-4-102(c) (1977). *Contra*: Ariz.Rev.Stat.Ann. § 13-703(C) (1979 Supp.); Ark.Crim.Code. § 41-1301(4) (1977); Colo.Rev.Stat. § 16-11-103(2) (1979 Supp.); Conn.Gen.Stat.Ann., § 53a-46a(c) (1980 Supp.); Ill.Ann. Stat., ch. 38, § 9-1(e) (1973); Ind.Code.Ann. § 35-50-2-9(d) (1973); Okla.Sta.Ann., tit. 21, § 701.10 (1976 Supp.); Wash.Rev.Code.Ann. § 10.94.020(4) (1977).

> of the offender'. . . . Otherwise, "the system cannot function in a consistent and a rational manner'" (citations and footnote omitted). *Id.*, 428 U.S. at 189.

See also *Id.*, 428 U.S. at 203-204. The necessity of individualized sentencing based upon a broad range of evidence receives even greater emphasis in *Woodson* v. *North Carolina*, 428 U.S. 280, 303-305, (1976); and *Lockett* v. *Ohio*, 438 U.S. 586, 602-606 (1978).

On the basis of the evidence before it, the sentencing authority must take at least two actions in rendering a verdict as to punishment. First, it must make a specific written finding that at least one statutory aggravating circumstance is established by the evidence, thus creating the possibility that a death sentence may be imposed.[4] Second, given that the death penalty *may* be imposed, the sentencing authority must decide whether or not this sentence *should* be imposed and thereby render a verdict of death or of a lesser punishment; many statutes characterize this process as determining whether "the aggravating circumstances outweigh the mitigating circumstances." Cal.Penal Code § 190.3 (1978 Supp.). See also Ala.Code, tit. 13A, § 5-47(e) (1981 Supp.); Ind.Code.Ann. § 35-50-2-9(e) (1973); Mo.Rev.Stat. § 565.012.1 (1978); 42 Pa.Cons.Stat. Ann. § 9711(e)(1) (1981 Supp.).

From the above facts, it is apparent that the term "aggravating circumstance," as used in most state statutes,

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[4]Some states impose additional requirements, such as that the sentencing authority specify any mitigating circumstances it found, e.g., Md.Ann.Code., act. 27 § 413(j) (1979 Supp.); or that a finding be made of the defendant's future dangerousness, e.g., Tex.Code.Crim.Proc.Ann., Art. 37.071(b) (1973). The above generalizations as to the sentencing process do not apply to Texas and the two other states which employ the Texas system of capital sentencing. Ore.Rev.Stat. § 163.116 (1979); Va.Code.Ann. § 19.2-264.4 (1980 Supp.). See *Jurek* v. *Texas*, 428 U.S. 262, 269-274 (1976) for an explanation of that system.

has two entirely different meanings according to the context in which it is used. The first (and arguably more accuate) meaning of "aggravating circumstance" is the *legal conclusion* the sentencing authority must derive from the evidence in order to even consider the possibility of a death penalty. For example, if the prosecution seeks the death penalty on the theory that the murder was committed after the defendant had escaped from a lawful place of confinement, Ga.Code.Ann., § 27-2534.1(b)(9), the jury or trial judge must first review the evidence and determine whether this statutory element is present—if the sentencer does not make the necessary legal conclusion that this or some other statutory agravating circumstance is present, the defendant is entitled to a sentence of imprisonment as a matter or law. The second meaning often given the term "aggravating circumstance," particularly apparent in the statement that the aggravating and mitigating circumstances are "weighed" to determine punishment, is the *evidence in aggravation* which is before the sentencing authority. The jury or trial judge does not weigh the statutory language of the aggravating and mitigating circumstances, it weighs the evidence which aggravates or mitigates the murder committed.[5] Any contrary interpretation of "aggravating circumstance" in this context, requiring the sentencing authority to consider only the statutory language instead of the facts, would be irrational, unenforceable (since a jury will inevitably and properly consider the evidence before it) and directly contrary to the requirement that the sentencing process take into account the individual facts relating to each crime and de-

[5]The ambiguity in the term "aggravating circumstance" as used in the laws of many states is avoided in the statutes of the State of Delaware; Del.Code. tit. 11, § 4209(d)(1) (1979) provides that the jury or judge must first find at least one "statutory aggravating circumstances," and then may weigh "all relevant evidence in aggravation or mitigation" in determining whether the death penalty is appropriate.

fendant. *Lockett* v. *Ohio, supra,* 438 U.S. at 602-606; *Gregg* v. *Georgia, supra,* 428 U.S. at 197-198.

These principles clearly indicate the answer to the issue at bar. The sole significance of statutory aggravating circumstances is to determine, at the threshold of the sentencing deliberation, whether the death penalty *may* be imposed; the sentencing authority must review the evidence before it and conclude whether any of the statutory categories submitted to it is present. As pointed out in *Gregg* v. *Georgia, supra,* 428 U.S. at 188-198, this requirement serves to "limit" and "channel" the discretion of the jury in making the sentencing decision. Once this determination is made (and assuming that an aggravating circumstance its found), the issue is whether the death penalty *should* be imposed, and the language of the statutory aggravating circumstances have nothing to do with this question—rather, this decision is made by the sentencing authority based upon the evidence before it. Since statutory aggravating circumstances operate only to open the door to consideration of the death penalty, and since any one such circumstance will perform this function regardless of the presence or absence of others, the invalidity of an aggravating circumstance found by the sentencing authority would impermissibly taint the sentence of death in only two circumstances: (1) if the invalid aggravating circumstance was the only aggravating circumstance found (thus entitling the defendant to a lesser sentence as a matter of law); or (2) if the invalid circumstance somehow resulted in the introduction of evidence at the punishment phase which would not otherwise have been admissible.

This reasoning is inherent in the decisions of Georgia and several other states which have considered the present issue. The Georgia courts have repeatedly held that a death sentence based upon multiple aggravating circumstances

will stand even if some of the circumstances are set aside. As stated in *Burger* v. *State*, 245 Ga. 458, 265 S.E.2d 796 (1980), *cert. denied* 446 U.S. 988 (1980),

> "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance, or in this case two, does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon" (citations omitted). *Id.*, 265 S.E.2d at 800.

See also *Stevens* v. *State*, 247 Ga. 698, 278 S.E.2d 398, 407-408 (1981), *cert. denied* 449 U.S 891 (1981); *Green* v. *State*, 246 Ga. 598, 272 S.E.2d 475, 485 (1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1402, 68 L.Ed.2d 320 (1981); *Gates* v. *State*, 244 Ga. 587, 261 S.E.2d 349, 358 (1979), *cert. denied* 445 U.S. 938 (1980). In so holding, the Georgia Supreme Court noted that the invalidity of the aggravating circumstances had no impact upon the evidence admitted at the punishment phase. *Burger* v. *State*, *supra*, 265 S.E.2d at 800; *Collier* v. *State*, 244 Ga. 553, 261 S.E.2d 364, 378 (1979), *cert. denied* 445 U.S. 946 (1980); *Stephens* v. *Hopper*, *supra*, 247 S.E.2d at 97. Other states have held to the same effect.[6] Thus, the Fifth Circuit decision in the case at bar is directly contrary to the long-standing law of the

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[6]*State* v. *Taylor*, No. 108 (N.C., November 3, 1981); *State* v. *Monroe*, 397 So.2d 1258, 1274-1276 (La. 1981); *Brown* v. *State*, 381 So.2d 690, 696 (Fla. 1980), *Cert. Denied* 449 U.S. 1118 (1981); *State* v. *Clark* 126 Ariz., 428, 616 P.2d 888, 895-897 (banc 1980), *cert. denied* 449 U.S. 1067 (1980); *State* v. *Rust*, 197 Neb. 528, 250 N.W.2d 867, 872-876 (1977), *cert. denied* 434 U.S. 912 (1977); *State* v. *Mercer*, 618 S.W.2d 1, 10 (n.5) (Mo. banc 1981), *cert. denied* ____ U.S. ____, 50 U.S.L.W. 3279 (October 13, 1981). *Contra*: *State* v. *Moore*, 614 S.W.2d 348, 351-352 (Tenn. 1981); *Hopkinson* v. *State*, 632 P.2d 79, 171-172 (Wyo. 1981); *Bufford* v. *State*, 382 So.2d 1162, 1174 (Ala.Cr.App., 1980); *Cf. Williams* v. *State*, No. CR80-217 (Ark., October 5, 1981), wherein the invalid aggravating circumstance caused the admission of otherwise inadmissible evidence.

State of Georgia and the majority of other states which have considered the present issue.[7]

II. The Rationale of the Fifth Circuit

In its opinions reversing the decision of the District Court and vacating respondent's death sentence, the Fifth Circuit offered two theories as to why a sentence of death must fall if any one of several aggravating circumstances found is deemed to be invalid. The first such theory is by analogy to the holdings of this Court in *Stromberg* v. *California*, 283 U.S. 359 (1931); *Yates* v. *United States*, 354 U.S. 298 (1957); *Street* v. *New York*, 394 U.S. 576 (1969); and *Bachellar* v. *Maryland*, 397 U.S. 564 (1970). *Stephens* v. *Zant*, *supra*, 631 F.2d at 406. In these decisions (all relating to the statutory abridgement of First Amendment rights), this Court held that where a jury returns a general verdict of guilt in a criminal prosecution, and where one of several statutory bases for the conviction is unconstitutional, the conviction must be reversed because it cannot be determined whether or not the verdict rested upon the unconstitutional ground. See *Stromberg* v. *California*, *supra*, 283 U.S. at 267-268; *Bachellar* v. *Maryland*, *supra*, 397 U.S. at 570-571. By analogy, the Court of Appeals argues, it cannot be established "that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens* v. *Zant*, *supra*, 631 F.2d at 406.

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[7]Curiously, the Fifth Circuit has recently rendered a decision which appears to directly conflict with its decision in the present case and support the states' majority position. In Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981), a habeas corpus appeal in a Louisiana death penalty case, the Court of Appeals adopted District Court language which acknowledges that, where several aggravating circumstances are found, the appellate court need only conclude that one aggravating circumstance is valid to uphold the death sentence. *Id.* at 1025; see *State* v. *Williams*, 383 So.2d 369, 374 (La. 1980), *cert. denied* 449 U.S. 1103 (1981).

Had the jury in the present case returned a punishment verdict which merely imposed the death sentence without specifying what statutory aggravating circumstances it found to permit such a sentence (and had this hypothetical verdict been permissible under Georgia law), the Fifth Circuit's argument might have more force. But the jury in this case *did not* return a general verdict—to the contrary, it specified in writing three separate aggravating circumstances which it found to authorize the death penalty. It is utterly undisputed that two of these circumstances are valid and supported by the evidence. As discussed in Part I, *supra*, the constitutional defect in the third aggravating circumstance does not in any manner change the fact that two valid circumstances were found, nor does it alter in the slightest the evidence which was properly before the jury in the punishment phase. Although the application of the principle enunciated in *Stromberg* to the invalidity of one of several aggravating circumstances in a capital case has not previously been accepted for adjudication by this court, it has received the attention of at least one Justice; in the denial of certiorari in *Drake* v. *Zant*, 449 U.S. 999 (1980), Justice White, dissenting from the denial of certiorari, stated that

> "The imposition of a death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either *Stromberg* v. *California*, [*supra*], *or Street* v. *New York*, [*supra*]. The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution." *Drake* v. *Zant*, *supra*, 449 U.S. at 1003 (White, J., dissenting).

For the reasons enunciated above, the *amici* concur in this conclusion.

As stated in its original opinion, the Fifth Circuit's second theory in support of its ruling was that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it." *Stephens* v. *Zant*, *supra*, 631 F.2d at 406. The difficulty with this argument is that it is a flatly erroneous statement of Georgia law; Ga.Code.Ann. § 27-2503(a) provides that

> "In [the punishment-phase] hearing, the [jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, *including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant*, or the absence of any prior conviction and pleas" (emphasis supplied).

See also *Stephens* v. *Hopper*, *supra*, 247 S.E.2d at 97. When confronted with this fact in the motion for rehearing, the court nimbly shifted its rationale to argue (without any citation of authority) that the presence of the invalid aggravating circumstance "may have unduly directed the jury's attention to [respondent's] prior convictions." *Stephens* v. *Zant*, *supra*, 648 F.2d at 446.

This is an astounding mode of analysis. This Court's decisions since *Furman* v. *Georgia*, 408 U.S. 238 (1972) have been directed to such matters as limiting and directing the jury's discretion in capital sentencing[8] and assuring that the jury has before it all evidence relevant to this issue[9]—in short, to creating conditions which would permit the jury to make an informed, rational and consistent decision as to whether a death sentence should be imposed. It is utterly undisputed that all of the procedural requisites stated in this Court's decisions were met in the pres-

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[8]Eg., *Gregg* v. *Georgia*, *supra*, 428 U.S. at 188-207, 220-226.
[9]*Lockett* v. *Ohio*, *supra*, 438 U.S. at 602-606.

ent case: the jury's discretion was properly limited by the Georgia statutory scheme, the defendant was not restricted in his presentation of mitigating factors and (as the Court of Appeals belatedly admitted) no inadmissible or irrelevant evidence was before the jury in the sentencing proceeding. Rather, the Fifth Circuit now essays what this Court has wisely never presumed to attempt: to retrospectively enter the jury room and speculate whether or not the jury's deliberations were correctly concluded. How is it to be determined what might cause a particular jury to "unduly" direct its attention to a particular item of evidence? If it is to be assumed that the presence of an invalid aggravating circumstance might produce such a result, how can the possibility be precluded that other factors—the argument of counsel, the demeanor of a witness, the order of proof—might result in an "undue focus" upon certain evidence? The argument of the Fifth Circuit sinks of its own weight into this morass of speculation.

Even assuming that some reliable guess might be made regarding the nature of the jury's deliberations, the fact remains that this issue was far beyond the scope of any legitimate review in an appeal from the denial of a federal habeas corpus petition. Under 28 U.S.C. § 2254, habeas corpus relief is available "*only* on the ground that [the habeas corpus petitioner] is in custody in violation of the Constitution or laws and treaties of the United States" (emphasis supplied); it is not a substitute for an appeal and does not permit a review of state trial issues which do not impinge upon federal constitutional rights. See *Wainwright* v. *Sykes*, 433 U.S. 72, 81 (1977). As noted above, the sentencing of respondent was totally in compliance with the procedural requirements stated in the decisions in this Court. That being the case, the Fifth Circuit had no roving commission to independently review the jury's verdict as to punishment and to speculate as to

possible sources of prejudice in that verdict—this was the duty of the Georgia Supreme Court under Ga.Code.Ann. § 27-2537(b), and that court properly performed its function and upheld the sentence of death. *Stephens* v. *State*, *supra*, 237 S.E.2d at 263-264.

The ultimate points to be made about this case are two. First, the invalidity of the third statutory aggravating circumstance had no possible impact upon whether the death penalty *could* be imposed in this case because there remained two valid aggravating circumstances found by the jury, either one of which would independently have permitted the consideration of capital punishment as an alternative. Second, the invalidity of the third statutory aggravating circumstance had no possible impact upon whether the death penalty *should* be imposed in this case because it had *no effect whatsoever* upon the evidence which was before the jury. Under these circumstances, it may not reasonably be argued that the presence of this invalid aggravating circumstance violated respondent's constitutional rights. The Fourteenth Amendment guarantee of due process is, in essence, a guarantee of fundamental fairness. See *Ingraham* v. *Wright*, 430 U.S. 651, 675 (1977); *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642-643 (1974). Fundamental fairness—the integrity of the capital sentencing process—is in no way impaired in this case.

III. In Search of Reasonableness in Death Penalty Review

Ten years ago, this Court decided the case of *McGautha* v. *California*, 402 U.S. 350 (1971), in which it rejected the claim that a bifurcated trial and the submission of specific aggravating or mitigating circumstances to the jury were requirements under the United States Constitution. Speaking for a majority of the Court (the last time for nine years that this would occur in a death penalty case), Justice Harlan stated that

> "the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of the students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court" (citation omitted). *Id.*, 402 U.S. at 221.

Thirteen months after *McGautha*, this Court radically changed its view in *Furman* v. *Georgia*, *supra*, a decision which resulted in confusion among courts, legislatures and learned authorities as to what was required to impose the death penalty in conformance with the Constitution.[10] Four years later, at an untold cost in legislative and judicial resources, this confusion was to some degree rectified by *Gregg* v. *Georgia*, *supra*, and its accompanying cases. Since *Gregg*, however, this Court has continued to periodically modify its view as to what is constitutionally required to impose the death sentence, steadily placing new areas and issues of capital sentencing procedure under the aegis of constitutional "due process", voiding new state statutes and releasing more condemned criminals from their sentence in the process. *Coker* v. *Georgia*, 433 U.S. 584 (1977); *Lockett* v. *Ohio*, *supra*; *Green* v. *Georgia*, 442 U.S. 95 (1979); *Godfrey* v. *Georgia*, 446 U.S. 420 (1980); *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Estelle* v. *Smith*, ____ U.S. ____, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Bullington* v. *Missouri*, ____ U.S. ____, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). By "constantly tinkering with the principles laid down in the five death penalty cases decided in 1976,"[11] this Court has led at least one United States Court of

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[10] *Lockett* v. *Ohio*, *supra*, 438 U.S. at 599. See *Beck* v. *State*, 396 S.2d 645, 656-657 (Ala. 1980).

[11] *Coleman* v. *Balkcom*, ____ U.S. ____, ____ S.Ct. ____, 68 L.Ed.2d 334, 339 (1981) (Rehnquist, J., dissenting from the denial of certiorari).

Appeals judge to suspect that "the Court is in process of hedging this penalty about with such obstacles that, as a practical matter, it cannot be carried out." *Gibson* v. *Jackson*, 578 F.2d 1045, 1051 (5th Cir. 1978) (Gee, Circuit Judge, specially concurring).

Whether or not such is the case, this Court's decisions from and after 1976 have collectively operated upon the state and federal court system to greatly assist in ensuring that sentences of death will not be carried out. In its capacity as the highest explicator of constitutional law (and as the supreme authority to which courts and counsel must look in formulating analyses and approaches to novel issues in this field of law), this Court has sent two signals to the lower courts and defendants in death penalty litigation. First, by its opinions and its recent history of dealings in this field, it has inadvertently promoted the implicit attitude, particularly in the federal judiciary, that death sentences may and should be invalidated upon any colorable theory which creates unease in the judicial mind, regardless of whether there exists any reasonable assertion that the defendant's constitutional rights were violated or that the defendant suffered any prejudice thereby. It might be said, without intending disrespect to the lower courts involved, that this Court's decisions have reinforced and given legal substance to some judges' personal views on the death penalty, both those who privately oppose it and those who find it difficult or impossible to take the responsibility of upholding such a sentence in any case before them, no matter how constitutional or how justified. This concern has been expressed by Justice Rehnquist:

> "Perhaps out of a desire to avoid even the possibility of a 'Bloody Assizes,' this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the Federal Government into arcane niceties which parallel

> the equity court practices described in Charles Dickens' 'Bleak House,' Even though we have upheld the constitutionality of capital punishment statutes, I fear that by our recent actions we have mistakenly sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs." *Coleman* v. *Balkcom, supra,* 68 L.Ed.2d at 339.

As discussed in Part II of this brief, *supra,* the present case is a classic instance of an unjustified and hypertechnical reversal of a death sentence by a lower court. See also *Jurek* v. *Estelle,* 623 F.2d 929, 956-985 (5th Ci. 1980), *cert. denied,* ___ U.S. ___, 101 S.Ct. 1724, ___ L.Ed.2d ___ (1981) (Brown, Circuit Judge, concurring and dissenting; and Reavley, Circuit Judge, dissenting); and the dissent of Justice Rehnquist from the denial of certiorari, *supra,* 101 S.Ct. at 1724-1728.

The second signal implicitly sent by this court from its recent course of decisions is to the convicted murderers on death row and to their counsel: the defendants are unmistakably encouraged to litigate, relitigate and then litigate again all conceivable theories relating to their convictions and sentences, in all courts possible and for as long as possible.[12] A condemned murderer has ample reason to believe, from past history, that if he delays his execution for two, five or ten years, this Court may eventually come up with a new doctrine which will retroactively vacate his sentence. Even if this does not come to pass, the defendant has grounds to hope (in part for the reasons discussed above) that the eighth or tenth court to review his case—often a federal appellate court on habeas corpus review—will rule in his

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[12]It is doubtful that the numerous organizations whose express design is to prevent the carrying out of any death sentence by perpetually litigating each and every such sentence truly require the benefit of such encouragement. See "The Mistress of Delay," NEWSWEEK, November 16, 1981, at pp. 102-103.

favor. "Given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error" (citation omitted). *Coleman* v. *Balkcom, supra,* 68 L.Ed.2d at 338. Both the case at bar and *Jurek* v. *Estelle,* supra, demonstrate the success of such tactics.

The present state of affairs cannot be described as anything other than a mockery of the criminal justice system. In the nine years since *Furman,* a total of four executions have taken place in the United States—only one involving a defendant who resisted the carrying out of sentence. Meanwhile, despite the periodic batches of condemned criminals whose death sentences have been vacated by the various recent decisions of this court, the national population of inmates awaiting execution is growing to increasingly less manageable proportions. The *amici* respectfully submit that the time is long past for this Court to signal an end to this unjust and systematic frustration of what this Court has repeatedly held to be a lawful and constitutional power of a civilized society. An indication by this Court, at the very least, that the Fifth Circuit was incorrect in vacating the sentence of death at bar would be a step toward this goal.

CONCLUSION

In view of the foregoing, the *amici curiae* respectfully submit that the judgment of the United States Court of Appeals should be reversed insofar as it vacated the sentence of respondent and remanded the cause for further proceedings.

Respectfully submitted,

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